No. 18-966

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
Petitioners,

v.

STATE OF NEW YORK, ET AL.,
Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

BRIEF OF FORMER CENSUS BUREAU DIRECTORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are five former Directors of the U.S. Census Bureau who served under both Democratic and Republican administrations: Vincent P. Barabba, Martha Farnsworth Riche, Kenneth Prewitt, Steven H. Murdock, and Robert M. Groves.[2]

Amici's collective experience in that position spans decades. They took part in planning and conducting the decennial census, post-enumeration surveys analyzing census undercounts, and the American Community Survey (the "ACS," which replaced the decennial census "long form" and is legally part of the decennial census), as well as other surveys regularly administered by the Census Bureau. They also carried out their statutory duty to determine when state or political subdivisions are required under Section 203 of the Voting Rights Act to provide language assistance for minority voting groups—based on the ACS since 2005 and, prior to that, based on the census long form that preceded the ACS. See 52 U.S.C. § 10503(b).

The former Directors therefore have unique expertise in the practices of the Census Bureau and the research and testing processes and procedures required to conduct an accurate, high-quality census. From that experience, the former Directors also gained unique insight on the likely impact on data quality and census coverage of a last-minute addition

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Both parties have filed with the Clerk blanket consents to the filing of *amicus* briefs.

[2] Former Director John Thompson was unable to join this brief due to his involvement as an expert witness in this litigation.

of an untested citizenship question on the 2020 Census.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decennial census satisfies the Constitution's directive that the federal government conduct an "actual Enumeration * * * within three years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten years, in such Manner as they shall by Law direct." Art. I, § 2, cl. 3. Pursuant to the Fourteenth Amendment, that "Enumeration" must "count[] the whole number of persons in each state." Amend. XIV, § 2.

The decennial census is thus a critical element of our nation's civic life, striving to count every person within the United States in order to allocate among the States the seats in the House of Representatives. The decennial census is also a massive undertaking—the nation's largest peacetime mobilization, which in 2010 included 600,000 temporary employees working in 494 temporary offices.[3]

The census requires both voluntary cooperation and meticulous planning. This Court, more than 35 years ago, recognized that voluntary self-response—the return by mail (or, today, over the Internet, telephone, or by mail) of census forms—is essential to the census' success. *Baldrige* v. *Shapiro*, 455 U.S. 345, 354 (1982). That is even more true today, because follow-up by census workers is extremely expensive and produces less accurate results.

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[3] Office of Inspector Gen., U.S. Dep't of Commerce, *Census 2010: Final Report to Congress* (2011), perma.cc/9B3M-WUZP.

Determining how to maximize voluntary participation—particularly in an era of increased skepticism of government institutions and political polarization—is a difficult task. That is why the Census Bureau employs an extensive multi-year testing process to assess the effects of possible changes to questionnaires—particularly with respect to the questionnaire that is sent to every household in the United States.

The effect of asking all respondents to complete the citizenship question was not subjected to *any* testing. That is a very significant deviation from Census Bureau procedures.

The lack of testing in connection with the 2020 Census is particularly important in this context because the Census Bureau's long-held view, based on prior experience and studies, is that the inclusion of such a question will significantly reduce the all-important self-response rate and is likely to reduce the census's accuracy. That is why the Bureau for the past 60 years (every decennial census beginning in 1960) has not included such a question on the "short-form" questionnaire sent to all or virtually all households.

The Census Bureau's own 2018 analyses of the effects of adding a citizenship question confirm that long-held view. And those analyses demonstrate that the decline in self-response will not be uniform across all households, but instead will have a disparately high effect on noncitizen households and on Hispanic-citizen households, which will have an adverse effect on the accuracy of the census. That disparate effect could well skew the allocation among the States of seats in the House of Representatives.

Finally, as former stewards of the census, *amici* have a more fundamental concern about the last-minute addition of a citizenship question without following the Census Bureau's long-established procedures: the significant risk that, given today's cynicism about government, the census would be characterized, and perceived, as a political exercise rather than an important part of our civic life carried out by a nonpartisan scientific agency staffed almost entirely by career civil servants. That would inflict long-term damage from which the census would not soon recover.

In 1999, this Court held impermissible—on statutory grounds—a change in decennial census procedures that was perceived by some as politicizing the census process. *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316 (1999). That decision avoided a decennial census conducted under a political cloud. Given the significant deviation from longstanding Census Bureau testing requirements, and longstanding Census Bureau views about the consequences for an accurate count, as well as the long-term adverse consequences for the census itself, the change at issue here should similarly be precluded.

For all of these reasons, *amici* urge the Court to affirm the district court's determination that the citizenship question should not be included in the 2020 Census.

ARGUMENT

The Decision To Add The Citizenship Question Deviated Dramatically From The Substantive And Procedural Standards That Have Long Governed The Decennial Census.

A. For 60 Years, The Census Form Sent To The Overwhelming Majority of Americans Has *Not* Included A Citizenship Question—Because The Census Bureau Consistently Concluded That Such A Question Would Produce A Less Accurate Count.

Every decennial census from 1960 through 2010 has been conducted in accordance with the Census Bureau's consistent view that asking every respondent about his or her citizenship would produce a less accurate population count. Only a sample of households has been asked to provide citizenship information.

The government is therefore wrong in characterizing Secretary Ross's decision as "reinstat[ing] to the decennial census a question whose pedigree dates back nearly 200 years." Pet. Br. 28. It is, in fact, a significant change that deviates from the Census Bureau's longstanding practice for six decades.

Since 1960, the modern decennial census has encompassed both a short form that is sent to the overwhelming majority of households and a longer form sent to a sample of households. A citizenship question has *not* been included on the short form; it has been one of the questions only on the long form. Pet. App. 18a-19a, 27a-28a.

The goal of the census short form is to collect "only the data necessary for a concise and condensed full

population count." J. David Brown et al., *Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census* 4 (Aug. 2018), perma.cc/M253-V5GR (Brown Study). It is "designed to be short, simple, and minimally intrusive, to maximize response rates" and thus conduct an "actual Enumeration," not an extrapolated one. *Progress Report on the 2020 Census: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 115th Cong. 5 (2018) (testimony of Professor Justin Levitt), perma.cc/7FV6-GXEF (Levitt Testimony). The number of questions is purposefully limited in order to obtain an accurate population count.

When it was in use, the census long form, by contrast, was sent to approximately one in six households. U.S. Census Bureau, *Decennial Census of Population and Housing*, perma.cc/M6LQ-RWHM. It collected detailed population and housing data, including data on citizenship status, educational attainment, disability status, and housing costs. See U.S. Census Bureau, *Notice of Required Information for the 1960 Census of Population and Housing*, perma.cc/DQ7P-UR9P. See also Pet. App. 18a.

"After years of testing, outreach to stakeholders, and interaction with key data users," the Census Bureau in 2005 replaced the census long form with the ongoing American Community Survey, which remains a legal part of the decennial census. U.S. Census Bureau, *Decennial Census of Population and Housing*, perma.cc/M6LQ-RWHM. See also Pet. App. 18a.

The ACS—an ongoing survey that produces annually-updated estimates of a variety of demographic, social, and economic characteristics—collects responses from a representative sample of households;

it currently records final interviews from over two million households per year. U.S. Census Bureau, *American Community Survey Sample Size*, perma.cc/2YM9-CZTK. See also Brown Study at 4 (calculating that the ACS reaches 1.6 percent of households annually).[4]

The Census Bureau website explains that the ACS is an "innovation" that allows it to "focus decennial census efforts on the constitutional requirements to produce a count of the resident population." U.S. Census Bureau, *Decennial Census of Population and Housing*, perma.cc/M6LQ-RWHM.

Excluding a citizenship status inquiry from the short form—and including it only on the long form and ACS—is a consequence of the Census Bureau's consistent determination that including the question on the short form would reduce the accuracy of the population count by deterring some households from filling out and returning census forms.

As early as 1940, a newspaper reported that "the Census Bureau has found a 'sore spot' among the census questions * * * . It's the question of whether or not a person is a citizen, and local enumerators are finding that Hartford aliens are more reluctant to admit their lack of citizenship than to disclose any other fact concerning themselves." *Census Finds 'Sore Spot' As*

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[4] The government's assertion (Br. 28-29) that 2010 "was the first time in 170 years that a question about citizenship or birthplace did *not* appear on any decennial census form" is thus both misleading and false. It is misleading because that question had been limited to the long form for all of the five prior decennial censuses—as it was limited to the ACS survey in 2010. And it is false because the ACS survey, which replaced the decennial long form, is deemed by the Census Bureau to be part of the decennial census.

Aliens Dislike Admitting Lack of Citizenship, Hartford Courant (Apr. 5, 1940).

In litigation in 1980, the Census Bureau explained that that it could not "count illegal aliens" because any effort to ascertain citizenship will inevitably "jeopardize the overall accuracy of the population count." *Federation for Am. Immigration Reform* v. *Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980). The Bureau stated that "obtaining even a reasonably accurate count of the total population would be impossible if a simultaneous effort were made to count illegal aliens separately." *Ibid.* Noncitizens would be reluctant to participate in the census for fear "of the information being used against them." *Ibid.*

With respect to the 1990 Census, Director John Keane, who was appointed by President Ronald Reagan, stated in congressional testimony that including on the short form a question about citizenship status would lead to the Census Bureau being "perceived * * * as an enforcement agency" and that such a perception would have "a major effect on census coverage" among both undocumented individuals and the "population at large." *Enumeration of Undocumented Aliens in the Decennial Census: Hearing Before the Subcomm. on Energy, Nuclear Proliferation, & Gov't Processes of the S. Comm. on Governmental Affairs*, 99th Cong. 16, 23, 32 (1985). Accord *Exclude Undocumented Residents from Census Counts Used for Apportionment: Hearing on H.R. 3639, H.R. 3814, and H.R. 4234 Before the Subcomm. on Census & Population of the House Comm. on Post Office & Civil Service*, 100th Cong., 2d Sess. 47-50 (testimony of John Keane).

The Census Bureau in 2014 continued to recognize that citizenship is a "sensitive" topic and that including a citizenship question on the form that every

household is required to complete would compromise the accuracy of the overall population count. See U.S. Census Bureau, *DS-16: Policy on Respondent Identification and Sensitive Topics in Dependent Interviewing* (2014), perma.cc/EL9N-MSBE.

For these reasons, Secretary Ross's decision to include a citizenship question on the decennial short form constitutes a very significant substantive change in the Bureau's long-established practice.

B. Addition Of A Citizenship Question Puts In Substantial Jeopardy The Accuracy Of The Population Count That The Constitution Requires.

The decennial census fulfills the Constitution's command that an "actual Enumeration" be conducted "every * * * ten Years" (art. I, § 2, cl. 3) so that seats in the House of Representatives may be "apportioned among the several States according to their respective numbers, counting the whole number of persons in each State" (amend. XIV, § 2).

This express constitutional command and the obvious importance to the nation of properly allocating seats in the House of Representatives make clear that obtaining an accurate population count is a critical element of our constitutional system. While the census today serves other important functions such as providing information used to allocate billions of dollars in federal spending annually (see, *e.g*, *Baldrige* v. *Shapiro*, 455 U.S. 345, 353 (1982)), the role assigned by the Constitution is paramount.

For that reason, the Census Bureau's decisions regarding the design of the decennial census have focused on obtaining an accurate population count. The longstanding view of the Census Bureau—reaffirmed

by several recent Census Bureau analyses—is that addition of the citizenship question will reduce the accuracy of the population count.

This Court has recognized that "an accurate census depends in large part on public cooperation." *Baldridge*, 455 U.S. at 354. A citizenship question will significantly reduce public cooperation by increasing non-response rates.

Importantly, the adverse effect of the citizenship question will not be uniform across the nation, but rather will disproportionately affect particular racial and ethnic groups and particular geographic areas. Those different levels of inaccuracy pose a significant threat to the accurate allocation among the States of seats in the House of Representatives.

Finally, even if the evidence of the adverse effect on an accurate population count were less clear, there can be no dispute that—based on the Census Bureau's own studies—there is, at minimum, a very serious threat to accuracy, and no benefit to accuracy, from the addition of the question.[5]

1. Studies consistently conclude that rates and quality of responses will fall if a citizenship question is included.

The Census Bureau's longstanding view that a citizenship question would reduce the accuracy of the

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[5] The government's defense of Secretary Ross's decision appears to prioritize the goal of obtaining more accurate citizenship data over the threat to an accurate population count. See Pet. Br. 31. But that reverses the Constitution's prioritization of the population count, and for that reason alone deviates significantly from the Census Bureau's long-established practices.

population count (see pages 5-10, *supra*) was confirmed by several studies undertaken by the Bureau during 2018.

In January 2018, Chief Scientist and Associate Director for Research and Methodology of the Census Bureau, John M. Abowd, analyzed the impact of adding a citizenship question—dubbed "Alternative B"—and concluded that adding the proposed question would "harm[] the quality of the census count" and would cause "[m]ajor potential quality and cost disruptions." Memorandum from John M. Abowd to Wilbur L. Ross, Jr., *Re: Technical Review of the Department of Justice Request to Add Citizenship Question to the 2020 Census* 1277-1278 (Jan. 19, 2018), perma.cc/C45S-LF8B (Abowd Mem.).

Dr. Abowd's memorandum explains that while all households respond at a lower rate to the ACS than the census, "the decline in self-response was 5.1 percentage points greater for noncitizen households than for citizen households." Abowd Mem. at 1280. Because only the ACS contains a citizenship question, the study determined it is a "reasonable inference" that addition of a citizenship question on the 2020 Census "would lead to a larger decline in self-response for noncitizen households," depressing the overall self-response rate. *Id.* at 1281.

Using a "cautious estimate" and assuming no impact on households with only citizens, the memorandum calculated that addition of the citizenship question would increase the non-response rate by 630,000 households as a "lower bound" estimate. Abowd Mem. at 1282. See also Pet. App. 43a-44a (district court's findings regarding the Abowd Memorandum).

A subsequent study completed by experts at the Census Bureau in August 2018 "to forecast the effect of adding a citizenship question to the 2020 Census" found, based on the study's data, that "adding a citizenship question to the 2020 Census would lead to lower self-response rates in households potentially containing noncitizens, resulting in higher fieldwork costs and a lower-quality population count." Brown Study at 2, 33. Using "revised assumptions"—because it was not subject to the time constraints of the Abowd study—this analysis estimated that approximately 2.1 million households and 6.5 million persons would fail to self-respond. *Id.* at 42-43. See also Pet. App. 142a-144a (district court findings regarding the Brown Study).[6]

These conclusions are supported by other studies finding that citizenship questions generate signif-

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[6] Although the Census Bureau follows up in-person with households that do not return a census form, these measures result in lower-quality data because of the increased likelihood of a response from a proxy rather than a household member, who is less likely to provide accurate information on the number of people residing in the household; the frequent need for multiple revisits; and the passage of time. See Abowd Mem. at 1281-1282; Pet. App. 20a, 151a-178a (district court findings regarding lower quality of data produced by non-response follow-up).

This follow-up is also extremely expensive—and there is no assurance that the 2020 Census budget will contain sufficient resources to permit follow-up. The Abowd Memorandum, using a "conservative" estimate, predicted $27.5 million in increased costs incurred from the projected follow-up required into noncitizen households. See Abowd Mem. at 1282; Pet. App. 48a. The later August study calculated an increased cost of "at least" $91.2 million. Brown Study at 43. These additional costs are not covered by the proposed appropriation in the President's Fiscal Year 2020 budget. See U.S. Dep't of Commerce, *Budget in Brief: FY 2020* (2019), perma.cc/W3QH-8B39.

icantly higher non-response rates than other questions that will be included on the 2020 Census form.

For example, a study analyzing item non-response rates for the citizenship question on the 2016 ACS concluded that "[r]espondents treat the question about citizenship differently than the other questions." William P. O'Hare, Georgetown Law Ctr. on Poverty and Inequality, *Citizenship Question Nonresponse* 21 (Sept. 2018), perma.cc/LX85-9B5A (O'Hare Study). The question's non-response rate is much higher than that of any other question that will be on the 2020 Census. *Id.* at 6. This difference is significant. "In 2016, the nonresponse rate for citizenship is 6.0 percent and no other question had a nonresponse rate higher than 1.8 percent." *Id.* at 11.

The district court correctly found—based on the Census Bureau studies and voluminous other information in the administrative record—that adding a citizenship question to the 2020 Census would "materially reduce response rates" and that "there is no evidence in the Administrative Record supporting a conclusion that addition of the citizenship question will *not* harm the response rate." Pet. App. 286a.

2. The undercount resulting from a citizenship question is likely to have a disproportionate impact on particular racial and ethnic groups and particular geographic areas.

The district court correctly concluded—again based on the Census Bureau's own studies—that the Census Bureau's non-response follow-up procedures will not be able to remedy the differential decline in self-response rates, leading to a differential undercount.

Thus, the court concluded that "the addition of a citizenship question to the 2020 census will cause an incremental net differential decline in self-responses among noncitizen households of at least 5.8%" as well as "a significant decline in self-response rates among Hispanic households." Pet. App. 150a. Because the court concluded that households that fail to respond are likely to be larger than those that do respond, it found that the differential undercount for noncitizen households would be "approximately 5.8%, and likely more"; the court found that a net undercount of Hispanic households is also likely. *Id.* at 171a.

It found that as a result of this differential undercount, "California residents face a certainly impending loss of representation in the House of Representatives" and that "Texas, Arizona, Florida, New York, and Illinois face a substantial risk of losing a seat." Pet. App. 175a.

The district court's conclusions are strongly supported by the Census Bureau's studies and other expert analyses in the administrative record.

To begin with, a 2018 Census Bureau study comparing responses to surveys with and without citizenship questions found that "households that may contain noncitizens are more sensitive to the inclusion of citizenship in the questionnaire than all-citizen households." Brown Study at 54. Therefore, "adding a citizenship question to the 2020 Census would lead to lower self-response rates in households potentially containing noncitizens, resulting in more nonresponse follow-up (NRFU) fieldwork, more proxy responses, and a lower-quality population count." *Ibid.*

The Abowd Memorandum analyzed break-off rates—the point at which a respondent decides to discontinue rather than complete a survey—disaggregated by race. See Abowd Mem. at 1281. It found that "Hispanics and non-Hispanic non-whites breakoff much more often than non-Hispanic whites, especially on the citizenship-related questions[.] [T]heir survey response quality is differentially affected." *Ibid.* Dr. O'Hare also found that racial and ethnic minorities, as well as foreign-born individuals, are less likely to reply to a citizenship question. O'Hare Study at 19-20.

The reduced response rate is not limited to noncitizen households. Rather, it extends to households containing both citizens and noncitizens—citizens with a noncitizen parent, child, or sibling will decline to respond in order to protect their family members. See Levitt Testimony at 11.

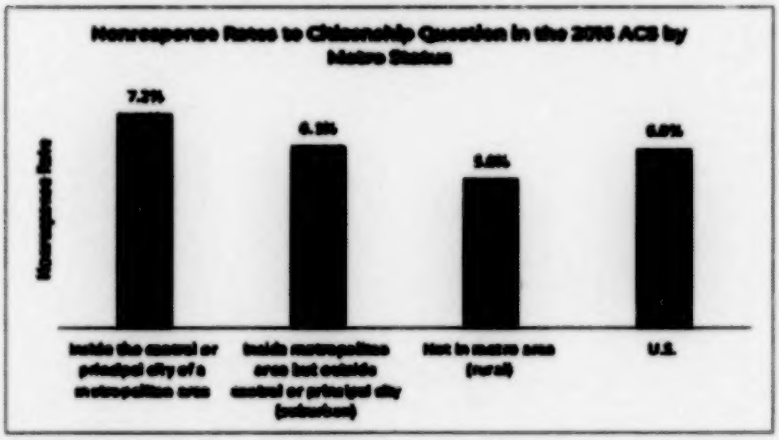
Finally, a decline in self-response rates means greater reliance on the Census Bureau's non-response follow-up (NRFU) efforts. The district court correctly recognized that "[a]s all agree, NRFU generates lower quality data than self-responses—in large part because it relies more heavily on proxies and imputations." Pet. App. 184a. See also *id.* at 185a (Census Bureau's recognition that NRFU data is less accurate); note 4, *supra*. The district court explained in detail the reasons why the inadequacies of NRFU therefore could not compensate for the disparate reduction in self-response rates resulting from the addition of a citizenship question. Pet. App. 151a-173a.

Moreover, this adverse effect would be added to the already-existing undercount of these population groups. Studies demonstrate that the census has undercounted communities of color, including the Black population and the Hispanic population, because they

disproportionately live in "hard-to-count" circumstances. See U.S. Census Bureau, *Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census* (May 22, 2012), perma.cc/X2SM-PYRY.

A disproportionate impact on foreign-born individuals and households with noncitizens will produce a geographic disparity in response rates, depending on how these groups are clustered throughout the Nation. For example, Arizona's non-response rate to a citizenship question on the 2016 ACS was "four times that of Vermont." O'Hare Study at 7.

And non-response rates to the citizenship question were the highest in central metropolitan areas and well below the national average in rural areas. See O'Hare Study at 15. Urban communities are therefore likely to be disproportionately disadvantaged by the anticipated undercount.



See *ibid.*

A count of the population in each State skewed by citizenship status could well redirect apportionment of seats in the House of Representatives. Pet. App.

173a-174a (district court findings regarding effect of undercount on apportionment of House seats).[7]

C. Addition Of The Citizenship Question Violated The Census Bureau's Longstanding Practices And Policies For Changing The Decennial Census.

The last-minute addition of the citizenship question also violates important procedural standards that have long been adhered to by the Census Bureau.

Possible changes to the census are traditionally subject to "years of repeated testing and evaluation." Nat'l Acads. of Scis., Eng'r & Med., *Letter Report on the 2020 Census* 4 (Aug. 7, 2018) (Task Force Letter). *E.g.*, U.S. Census Bureau, *Pretests and Dress Rehearsals of the 1970 Census of Population and Housing* 20 (1972) (reflecting years of pre-tests). That is because, as the National Academies of Science panel explained, "even small changes in question wording and in mode of administration can have significant effects on responses and on decisions whether to respond." Task Force Letter at 4.

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[7] The impact of a geographically disparate undercount also extends to federal funding. Census data are used to allocate hundreds of billions of dollars in federal funds each year—$800 billion in fiscal year 2016. Pet. App. 178a; Andrew Reamer, G.W. Inst. of Pub. Policy, *Counting for Dollars 2020: The Role of the Decennial Census in the Geographic Distribution of Federal Funds, Estimating Fiscal Costs of a Census Undercount to States* 2 (Mar. 19, 2018). The statutory standard for allocating particular funds often is more detailed than the population count, and can depend, for example, on the level of funding allocated to other States or the presence of communities eligible for select programs within each State. But that does not undermine the very basic observation that a skewed undercount will redirect funds—as the district court found. Pet. App. 178a-182a.

The district court provided an example of the reasons for this careful process:

> [a]fter the 1990 census, the Census Bureau considered adding a question regarding respondents' Social Security Numbers ("SSNs") to the "short-form" questionnaire. Before deciding to add such a question, however, the Census Bureau conducted a randomized controlled trial comparing a version of the questionnaire that asked about SSNs to one that did not in order to assess the question's impact on self-response rates. Overall, the Census Bureau observed a 3.4% decline in self-response rates attributable to the question, a decline that was not evenly distributed among subpopulations. In part due to these results, the Census Bureau did not—and does not to this day—ask a question about SSNs on the decennial census.

Pet. App. 34a (citations omitted).

The studied, deliberative process for considering changes to census questions has been codified in statute and Census Bureau procedures.

Congress in 1976 adopted the provisions codified in Section 141(f) of title 13, which require the Secretary of Commerce to provide Congress with specific information at specific intervals before the decennial census date. Three years before the census date, the Secretary must provide a report containing his determination "of the subjects proposed to be included, and the types of information to be compiled"—and, two years prior to the census, his determination "of the questions proposed to be included in such census." 13

U.S.C. § 141(f)(1)-(2). The Secretary may subsequently alter those submissions if he "finds that new circumstances exist" that "necessitate" a change in the subjects or questions. *Id.* § 141(f)(3).

The Census Bureau in 1998 began to develop its own statistical quality standards, a process that culminated in the issuance of a comprehensive set of standards in 2010. See U.S. Census Bureau, *U.S. Census Bureau Statistical Quality Standards* vii (2013), perma.cc/JAS4-T9HY.

These standards specifically require pre-testing of a new or revised question before it is included in a data-collection questionnaire:

> Data collection instruments and supporting materials must be pretested with respondents to identify problems (e.g., problems related to content, order/context effects, skip instructions, formatting, navigation, and edits) and then refined, prior to implementation, based on the pretesting results.

U.S. Census Bureau Statistical Quality Standards at 8 (sub-requirement A2-3.3). Pre-testing is required when "new questions [are] added," and one of the reasons for pre-testing is to "verify" that the question is "not unduly sensitive and do[es] not cause undue burden." *Ibid.*

The testing processes for the 2000 and 2010 Censuses were extensive. See, *e.g.*, Nat'l Research Council, *The 2000 Census: Interim Assessment, Panel to Review the 2000 Census* 42 (2001); U.S. Census Bureau, *2010 Census Content and Forms Design Program Assessment Report* 3-4 (2012), perma.cc/6NLZ-ZD6P.

Testing of questions for the 2020 Census began in 2008—two years *before* the 2010 Census. Lawrence D. Brown et al., Nat'l Research Council of the Nat'l Acads., *Experimentation and Evaluation Plans for the 2010 Census: Interim Report* 8 (2008); Pet. App. 99a.

The Census Bureau tested potential improvements to the questions on race and ethnicity—but "opted not to make the proposed changes * * * because a final decision had not been made as of December 31, 2017, leaving inadequate time to deliver the final wording to Congress two years prior to the census, as required by Section 141(f)(2)." Pet. App. 100a. The Census Bureau researched, tested, and ultimately adopted changes to the household relationship question, which obtains information on how each member of a household is related to the person who completes the form for that unit of people. Memorandum from Howard Hogan, Associate Director for Demographic Programs, to Teresa Anguiera, Acting Associate Director for Decennial Census, *Re: Final Demographic and Housing Content for the 2008 Census Dress Rehearsal and the 2010 Census* 1-2 (Feb. 13, 2007).

In sharp contrast, there was no testing of a citizenship question before Secretary Ross's decision to add it to the census:

> [N]either the Census Bureau nor the Commerce Department conducted any pretesting of the citizenship question * * *. There was no cognitive testing, field testing, or randomized control testing of the question, nor was there any testing of the question within the context of the entire questionnaire or consultation with the Census Bureau's advisory committees or outside researchers with relevant expertise. The one "end-to-end" test—in essence,

> a form of dress rehearsal—conducted for the 2020 census did not include the citizenship question.

Pet. App. 100a-101a (citations omitted).

The fact that a citizenship question was included in the ACS, and had been tested in that context, does not in any way satisfy the testing requirement for inclusion of a question in the decennial census questionnaire sent to all households. As the district court explained in detail, the purpose, goals, and contexts of the two surveys are very different. In addition, the question was last tested in 2006, and there are significant questions about the current validity of that testing. Pet. App. 103a-105a. See also pages 11-13, *supra* (studies of 2016 ACS reporting differential response rates to ACS citizenship question).

The district court correctly concluded that the failure to pre-test the citizenship question for possible inclusion in the 2020 Census "was a 'significant deviation' from the Census Bureau's historical practices, its own mandatory Statistical Quality Standards, and its previously announced plans for the 2020 census." Pet. App. 102a. The accuracy of the constitutionally-mandated population count should not be put at risk by an untested question.

D. A Citizenship Question Is Not Needed To Provide Information "Critical" For Voting Rights Act Enforcement.

Secretary Ross's stated justification for adding the citizenship question was to respond to the request from the Department of Justice stating that citizenship data were "critical" to enforcement of Section 2 of the Voting Rights Act of 1965. See Pet. App. 564a-569a. The DOJ letter asserted that the Department

needs citizen voting-age population (CVAP) data "for census blocks, block groups, counties, towns, and other locations where potential Section 2 violations are alleged or suspected." *Id.* at 566a.

The ACS provides citizenship data that permit highly accurate estimates of citizen voting age population at the block group level—at a 90-percent level of confidence. U.S. Census Bureau, *Citizen Voting Age Population (CVAP) Special Tabulation* 3, perma.cc/PZF3-TPGR.[8]

There is no support for DOJ's assertion in December 2017 that there is a need for such data at the more granular, census block level. Significantly, DOJ did not request collection of that information during the multi-year consultation process involving the Census Bureau and other federal agencies regarding the subjects of each decennial census—which precedes the Census Bureau's statutory obligation to inform Congress of those topics three years before the census date. See U.S. Census Bureau, *Subjects Planned for the 2020 Census and American Community Survey* (2017), perma.cc/T7ZQ-6KSW. And if the information were needed, there are other ways to obtain it.

To begin with, as the district court observed, "during the entire fifty-four-year existence of the [Voting Rights Act], DOJ has never had 'hard count CVAP data from the decennial census." Pet. App. 296a-297a. And the Justice Department did not "identify a single VRA case that [it] failed to bring or lost because of inadequate block-level CVAP data." *Id.* at 295a.

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[8] A confidence interval is a range of values that describes the uncertainty of an estimate. U.S. Census Bureau, *A Basic Explanation of Confidence Intervals*, perma.cc/QVL2-UNF9.

But, assuming such a need could arise, experts can readily and reliably translate ACS data to the block level via statistical imputation. Indeed, the Census Bureau's analysis explained that ACS CVAP data could fill such a need with "small-area modeling methods" and use of "statistical modeling methods to produce the block-level eligible voter data." Abowd Mem. at 1278-1279. That is the same process that the Census Bureau uses to make determinations under Section 203 of the Voting Rights Act (which requires calculations of citizens in small political units). See U.S. Census Bureau, *VRA Section 203 Determinations: Statistical Methodology Summary* (Nov. 30, 2016), perma.cc/RFE5-SSTD.

Finally, citizenship data generated by a last-minute, untested question on a sensitive topic that is reliably predicted to undercount particular populations would have very limited value. Any purported added precision would be undermined by the data's unreliability. And data compromised by an undercount that disproportionately impacts certain racial and ethnic minority groups could undermine the efficacy of VRA claims brought on behalf of the very populations that they are intended to protect. See Levitt Testimony at 20.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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